for the Plaintiff, and direct him to enter judgment for the Defendant in its stead.

As to the costs of these proceedings, I have decided to make no order. If the defendant had not induced the Assistant Controller of Labour to interfere on his behalf and take steps to render the Plaintiff's paramour liable to repay the Defendant's marriage expenses, I am tolerably certain that the Plaintiff would never have taken action in the District Court against the Defendant. The Plaintiff is obviously under the mistaken impression that the agreement which the Assistant Controller of Labour induced her to sign rendered her, as well as her paramour, liable to repay those expenses; and before me she stated, quite frankly, that the loss of her paramour's society and support, which was one of the results of that agreement, led her to make a compensating claim, so to speak, in the District Court. According to Mr. V. Nadason Pillay the Assistant Controller of Labour was not acting in accordance with Tamil custom when he took the steps which he did take to recover the Defendant's marriage expenses from the Plaintiff's paramour; and I doubt very much whether the written agreement to pay the same could be enforced against the latter. My advice to all the three parties concerned in these disputes is to leave one another alone and keep away from Law Courts, Panchayats and Controllers of Labour for at least two years.

Order accordingly.

[ORIGINAL CIVIL JURISDICTION]

MANNING, J.

February 23, 1940.

IN RE YAP TECK HEE deceased.
YAP PONG SAI & OTHERS
v.
TAN SEE TIONG & ANOTHER.

[MALACCA SUIT No. 46 of 1938]

Limitation —Will—Suit for administration, with claims for breach of trust and wilful default—Third party receiving trust property with notice of trust—Express trustee—Limitation Ordinance (Cap. 16), art. 99—Limitation period—S. 18—Acknowledgement—S. 9—Suit againt trustee.

The Court will look at the substance of an action rather than its form or the remedies actually prayed, to ascertain the period of limitation applicable thereto.

In a suit by beneficiaries under a will (who have not received their shares and legacies from the testator's estate) claiming in respect of breaches of trust, wilful default, and administration of the estate, against the executor and a person to whom the trust property had been assigned under circumstances which make him liable as an express trustee the period of limitation applicable is 12 years, under art. 99 of the Limitation Ordinance, for such an action is in substance a suit for a legacy or share or residue under the will.

An acknowledgment by an executor of his duty to account in the ordinary way is not such an acknowledgment as will operate as the beginning of a new period of limitation in a action against him for breach of trust or accounts on the footing of wilful default.

An action by a beneficiary against an executor who has received the testator's property and disposed of it, for the purpose of making him account for such property, and hand over to the plaintiff what may be found due as the result of the account, is a suit which cannot be barred by any length of time under the Limitation Ordinance.

If a stranger to the trust receives trust property under a breach of trust in which he concurs with the trustee, he must himself be treated as an express trustee and a suit against him for such property would not be barred by any length of time (following **Soar v. Ashwell** (1893) 2 Q.B. 390).

Cases referred to:—

(1) *Dassi v. Bose,* I.L.R. 30 Cal. 369.

(2) *Dewraj & ors. v. Nursey & ors.* I.L.R. 8 Bom. 432.

(3) *Soar v. Ashwell,* (1893), 2 Q.B. 390.

ACTION.

The facts and arguments appear sufficiently from the judgment.

E. R. Koek (*T. D. Talukdar* with him) for plaintiffs.

S. C. Goho (*D. Bannerjea* with him) for defendants.

[In addition to the authorities mentioned in the judgment, the following cases were cited: for the plaintiffs, **Khaw Sim Tek v. Chuah Hooi Gnoh Neoh** (1922) 1 A.C. 120; **Kasivisvanathan Chettiar v. Chokalingam Chettiar** (1935) A.C. 163; for the defendants, **Tholosingam Chitty v. Vedachellaiyah** A.I.R. (1918) Madras 624; **Lacons v. Warmoll** (1907) 2 K.B. 350.]

Cur. Adv. Vult.

Manning J.—The plaintiffs are five of the beneficiaries under the will of Yap Teck Hee, hereinafter referred to as the deceased, who died on the 18th June 1920. The defendant, Tan See Tiong, hereinafter called the 1st defendant, was one of the executors of the will and probate was granted to him on the 13th August 1920. Only two of the beneficiaries have received anything under the will and it is now alleged that the 1st defendant was guilty both of mal-administration of the estate and of breaches of trust and it sought to make him restore the value of

the property lost to the estate and to render an account on the footing of wilful default. The defendant Tan Kee Bak, hereinafter called the 2nd defendant is the father of the 1st defendant, and against him it is alleged that he received part of the deceased's estate with the knowledge that it came into his hands by virtue of a breach of trust and the Court is asked to declare that he was a constructive trustee of this property and to order him to account for the same.

A document had been executed by three of the plaintiffs releasing the 1st defendant from all claims and demands in respect of the estate. These three plaintiffs seek to have this release set aside and the 1st defendant has consented to an order to this effect.

A plea of *res judicata* by the 1st defendant has been abandoned.

One of the matters complained of by the plaintiffs concerned some furniture said to have been left by the deceased. It was alleged that the 1st defendant had failed to realise this part of the estate. On the evidence I am satisfied that the deceased's widow claimed this furniture as her own property. The 1st defendant cannot be blamed in any way for not taking possession of this furniture for the benefit of the estate.

The deceased left debts amounting to between $8,000 and $9,000. One of these debts was a sum of $7,233.50 due to the 2nd defendant. The plaintiffs have challenged the existence of this debt and its amount, but on the documentary and oral testimony before me I find that it was a genuine debt due to the 2nd defendant and that the amount was correct. The 2nd defendant and the deceased were partners in two rubber estates, and I believe the evidence that the 2nd defendant had assisted the deceased by lending him two sums of $5,000 and $2,500 to help him to purchase his shares in these estates. Documentary evidence submitted by the plaintiffs showed that for the three years 1917, 1918 and 1919 the deceased's share of the profits in these estates amounted to $8,760.46½, and the defendants were put to the proof of showing that this amount had been credited to the deceased. The defendants succeeded in satisfying me that this had been done. There had been numerous transactions between the deceased and the 2nd defendant, and, as I have said above, I find that at deceased's death he did owe the 2nd defendant a sum of $7,233.50.

There was no ready money immediately available and the 1st defendant had to find some in order to pay the funeral expenses and the estate duty. The deceased had directed in his will that his funeral expenses should be limited to a sum of $1,000. The 1st defendant said he expended this amount but he has been criticised because he has given no details. A long period has elapsed since the funeral; the amount is not excessive, having regard to what gentlemen of the deceased's nationality usually desire to have expended on the ceremony; and there is no complaint by the family that the ceremony was carried out in a niggardly manner or otherwise than it ought to be. For these reasons I accept the 1st defendant's statement that he did expend this amount of $1,000. The estate duty amounted to $1,058.12. The 1st defendant decided to raise these amounts by borrowing them from the 2nd defendant. This act is now charged against him as mal-administration of his duties as executor and also as leading up to an alleged breach of trust to which I shall refer later. The plaintiffs say that any prudent man in the position of the 1st defendant would have sold the immovable property left by the deceased, or at any rate part of it, in order to pay the funeral expenses and estate duty and the debts owing by the deceased. It will therefore be convenient at this stage to deal with the immovable property left by the deceased, to state what happened to it after the deceased's death, and at the same time to consider the criticisms which have been levelled at the first defendant.

The deceased left a house at 32 Goldsmith Street, Malacca. He had been living in it at the time of his death and his family continued to occupy it after his death. I think the 1st defendant was justified in allowing the family to remain in occupation and exercising his discretion not to sell at the moment. The first plaintiff, the deceased's son, was the residuary legatee. He was at the time only 16 years of age and would not become entitled to anything until he attained the age of 21. In his affidavit for the Commissioner of Estate Duties the 1st defendant had valued this house at $7,000. The Government valuation was $11,160. It was subject to a mortgage of $3,000 on which $160 interest had accrued at the date of deceased's death. The mortgagee was a money-lender and on the 3rd November 1921 he chose to exercise his power of sale and the house was purchased by another money-lender for $3,700. Six months later it was purchased from this money-lender by the original money-lender.

This house could have been saved only by selling the other immovable properties of the deceased. These consisted (1) of 7/19th share in a rubber estate at Panchore, (2) 1/3rd share of a rubber estate at

Lendu. At the date of deceased's death No. 1 was valued by the 1st defendant at $24,000 and by the Government at $27,945; No. 2 was valued by the 1st defendant at $5,500 and by the Government at $8,250. There were debts to be paid as well as the mortgage debt on the Goldsmith Street house and the obvious thing for the 1st defendant was to sell these properties as soon as possible and at any rate within the executor's year. He did not obtain probate until August 1920 and he did not extract the grant until October 1920. He has assigned this as an excuse for not selling at once, he says he did not know he had power to sell before he was actually granted administration of the estate. This lack of knowledge was perhaps excusable, but I see no reason why he should have sold earlier than the end 1920 or the beginning of 1921. He could not have foreseen what actually happened, namely, a tremendous fall in the price of rubber. He says he did try to sell, but could obtain no buyers. On the evidence before me, rubber, which had been at $134 a pickul in March 1920, went steadily down in price and in March 1921 it stood at a figure between $28 and $29, a fall of about 80% in price. One would expect rubber land to decline also in value and this is borne out by the evidence before me; viz. that such land was worth $600 to $700 an acre at the date of deceased's death; at the end of 1920 the price had gone down by about 60% and one sale in January 1921 realised only $35 an acre. If $30,000 be taken as a conservative estimate of the value of deceased's property in both estates at the date of his death, it may be concluded that it was not worth much more than $10,000 at the end of 1920 and beginning of 1921.

These facts show that the 1st defendant was faced with a serious problem. If he sold the Goldsmith Street house he could not expect to raise much more than would pay off the mortgage, if he sold the property in the rubber estates, he would sell at a ruinous loss compared with the value which they bore at the date of deceased's death. One can readily believe that there was difficulty in selling at all. The property would have to realise about $12,000 to pay the debts, funeral and legal expenses. Even if this amount was realised, the Goldsmith Street house was left saddled with its mortgage, and there would be no money to pay anything to any of the beneficiaries under the will. The 1st defendant decided not to sell and to wait in the hope of a rise in the price of rubber. I am not prepared to say that he was wrong.

He says, however, that his hands were forced by circumstances and that he was compelled in the end to mortgage this property. After the death of the deceased he received certain sums of money derived from sales of various goods, rent and debts due to the estate. He paid $858.32 to deceased's widow and $300 to another beneficiary under the will. There were various expenses to be met, the largest items being funeral expenses and estate duties; and the money was raised by borrowing it from the 2nd defendant. A sum of $4,735.59 altogether was borrowed, of which $1,811.06 was repaid. The 2nd defendant was a creditor of deceased's estate to the extent of $7,233.50 at the date of deceased's death, and these further borrowings had raised the amount to $11,500 by March 1921. The 2nd defendant then said he was being pressed by a money-lender but that the latter would be satisfied if he, the 2nd defendant, could obtain a mortgage of the deceased's property in the two rubber estates.

Several points arise in connection with this. In the first place I do not think the 1st defendant was to blame in borrowing whatever money was required from his father. It was an obvious source from which to obtain any money that was required. The 1st defendant may well have thought that his father would be content to wait until better times. The same consideration applied when his father asked for the mortgage as a security for the debt. The 2nd defendant could easily have obtained judgment and attached the deceased's property in the rubber estates. It was open to the 1st defendant to sell this property for whatever he could obtain for it, but he would probably have realised less than $11,500. He may have thought that his father would not press for capital or interest, that rubber would recover, and that there might eventually be a credit balance in favour of the estate. Looking at the mortgage as a transaction by itself, and considering the difficult stituation of the 1st defendant, I do not think he acted in an imprudent manner.

Mr. Koek, however, for the plaintiffs, says I must not look at the mortgage by itself, I must consider what subsequently happened. The 2nd defendant was not content to wait. On the 18th January, 1922, he exercised his power of sale under the mortgage. The deceased's property in the rubber estates was knocked down to one Tan Koh Hian for $7,300. Tan Koh Hian almost immediately repented of his bargain and the wife of the 2nd defendant took his place as the highest bidder and became the owner of the property. On the 26th January 1923 she sold the property to her husband the 2nd defendant for $4,500. The 2nd defendant thus became the sole owner of the whole

of the two rubber estates. He held on to them until 1925, in which year there was an abnormal rise in the price of rubber, and he was able to obtain the large sum of $72,000 for them.

No doubt, this result is very exasperating to the beneficiaries and they may be excused for thinking that the whole thing was a conspiracy between the father and the son with the object that the father should become the owner of the whole of the two rubber estates and be able to reap a harvest at the appropriate time. The 2nd defendant may justly be suspected of some sharp practice in getting the deceased's property into the ownership of his wife and subsequently purchasing it from her. But whatever view may be taken as to the actions of the 2nd defendant, one must not lose sight of the fact that it is the conduct of the 1st defendant which has to be considered. When he borrowed from the 2nd defendant, did he know the 2nd defendant would demand a mortgage of the rubber estates? When he mortgaged these estates did he know that the 2nd defendant would not wait long before exercising his power of sale? Did he know that by a trick the 2nd defendant would get the property knocked down to his wife? Did he know that the 2nd defendant's wife would shortly sell to the 2nd defendant for much less than she paid for it herself? Did he know that there would be a tremendous rise in the price of rubber in 1925 and that the 2nd defendant would be able to realise an enormous profit? I cannot infer that he knew any of these things. It has not even been suggested that the 1st defendant ever received a cent from the 2nd defendant in connection with these transactions. Mr. Koek has said there is an accumulation of suspicious facts and that this amounts to proof. But I cannot look at the matter from the standpoint of an angry and disappointed beneficiary, and I hold that there is no evidence that the 1st defendant deliberately engineered the events so that the 2nd defendant would have the opportunity of making a profit when the time arrived.

Mr. Koek has also asked me to say that the 1st defendant gave the money-lender a free hand with the Goldsmith Street house on condition that the money-lender gave him a free hand with the rubber estates. Again there is no evidence.

Mr. Koek puts the charges of breach of trust against the 1st defendant under four heads: (a) The conversion of the proceeds of the mortgage of the two rubber estates, or a fraudulent dealing with property. As to this, the 1st defendant did not receive the money realised by the sale of this property. He has entered the amount in his accounts, but this was obviously a mere book entry to show what had become of the property. I have held that there is no evidence that there was fraud in the sense of a conspiracy between the 1st and 2nd defendants to ensure that the 2nd defendant should become sole owner of the two rubber estates.

(b). Payment of $1,811.06 to the 2nd defendant. I am satisfied that this was a part repayment of money borrowed from the 2nd defendant.

(c). Neglect to realise the property within the executor's year for the payment of debts. I have dealt with this and do not find any breach of trust.

(d). Neglect to pay off debts so as to avoid accumulation of interest. I have indicated my view of the difficulties the 1st defendant found himself in and do not think that any breach of trust was committed in this connection.

There are also four allegations of wilful default:

(a) Neglect to realise deceased's share in the rubber estates.

(b) Neglect to realise the house in Goldsmith Street.

(c) Neglect to pay off a debt due to the money-lender.

(d) Neglect to get in the furniture.

(a), (b) and (d) have been dealt with, (c) has been dealt with incidentally. The 1st defendant had not money available to pay this debt. He could have obtained sufficient money only by realising the immovable property and his failure to do this has been explained.

If the 1st defendant did not commit any breach of trust, there is naturally no case against the 2nd defendant.

I propose to consider the defence of limitation set up by both defendants. The 1st plaintiff came of age on July 23rd, 1925. The writ was issued more than twelve years after that date. Mr. Goho says that the suit comes under art. 97 of the Schedule to the Limitation Ordinance, which fixes the period at 6 years. Art. 97 refers to a suit for which no period of limitation has been provided elsewhere in the Schedule; and if mere words are looked at Mr. Goho is right. Mr. Koek says the substance of the suit must be looked at, and that art. 99 is the appropriate number in the Schedule, which fixes the period at 12 years. This number relates to a suit for a legacy or share of residue bequeathed by a testator. The present suit is against an executor and another for

breach of trust, replacement of moneys and an account, and against the executor alone for wilful default. I agree with Mr. Koek that I must consider the substance of the action, and that it really amounts to one by four of the beneficiaries to get their legacies, or part of them, paid, and by the other beneficiary to get his share of the residue. I hold therefore that the appropriate period is 12 years, not 6. The matter is of importance only with reference to s. 18 of the Ordinance. The 1st plaintiff's solicitors had on the 9th April, 1937, written to the 1st defendant asking for certain statements and accounts in connection with the estate of the deceased. On the 20th April, 1937, before the 12 years had expired, the 1st defendant's solicitors replied in the following terms:—

20th April, 1937.

"Dear Sirs,

"*Estate of Yap Teck Hee, deceased*"

"Your letter of the 9th instant to Mr. Tan Se Tiong has been handed over to us with instructions to reply.

"Our client has handed over to us the account books of the estate written in Chinese and we are having them translated. We will reply to your queries as soon as the translation is completed.

Yours faithfully,
sd. Rogers & Son.

Messrs. Donaldson & Burkinshaw,
Malacca.

Mr. Koek says this is an acknowledgment of liability by the 1st defendant.

It may be taken as an acknowledgment by the 1st defendant that he was liable to account in the ordinary way, but it is not an acknowledgment that he was guilty of any breach of trust or wilful default in his administration, and it therefore cannot operate to defeat a limitation defence so far as the action of the plaintiffs is concerned with these two matters. It defeats any defence of limitation so far as the liability of the 1st defendant to render an ordinary account is concerned, and it does not, of course, affect the 2nd defendant in any way.

Mr. Koek, however, relies in the main on s. 9 of the Limitation Ordinance which is as follows:—

"Notwithstanding anything hereinbefore contained no suit against a person in whom property has become vested in trust for any specific purpose or against his legal representatives or assigns, not being assigns for valuable consideration, for the purpose of following in his or their hands such property shall be barred by any length of time."

It is admitted by Mr. Goho for the defendants that the deceased's property did vest in the 1st defendant, and he did not contest seriously the proposition put forward by Mr. Koek for the plaintiffs that it was vested in trust for a specific purpose—viz: conveyance to the 1st plaintiff when he came of age, subject to the payment of funeral expenses, debts and legacies. Mr. Goho, however, does argue that this is not a suit for the purpose of following in the hands of the defendants the property of the deceased. He says the suit is one for damages. Mr. Koek cites the cases of *Dewraj and others v. Nursey and others*[2] *Dassi v. Bose*[1]. These cases show that the Court looks at the substance of the suit rather than at the actual remedies sought. The *Dewraj* case was a suit to make trustees liable in respect of moneys lost to a trust; the *Dassi* case was a suit for breaches of trust, account and administration. In both cases it was held that the suits were not barred by limitation. In the *Dassi* case, Maclean C.J. *Ibid* 384 said "It is clear that the purpose of the suit was to follow the property, which came in the hands of the two executors, to make them account for it, and to hand over to the plaintiff as the result of that account what may be found due to her." The other Judges concurred with his judgment. I am convinced by these authorities that Mr. Koek is right and that the action against the 1st defendant is not barred by limitation. As regards the 2nd defendant it is said in *Rustomji* on the Law of Limitation (5th edn.) Vol. I, 173 that the section applies to cases where a stranger participates in the fraud of an express trustee; i.e. the stranger is notionally deemed to have the property vested in him for the same specific purpose as the express trustee. The Indian decisions are not consistent on this point. The statement in *Rustomji* is based on the analogy of the law of England, see the case *Soar v. Ashwell*[3]. I think that the only fair course to take is to hold in accordance with the judgment of Kay L.J. in that case, that if a stranger receives property under a breach of trust with which he concurs he must be treated as an express trustee. If the plaintiffs had satisfied me that the 1st defendant had committed a breach of trust and that the 2nd defendant had received the property, knowing that he was receiving it in consequence of a breach of trust, then the suit against the 2nd defendant would not be barred.

From what I have said all the plaintiffs fail in their claim against the 1st defendant either to have any moneys replaced by him, or for a declaration that the 1st defendant has committed any breach of trust,

or for an account of his administration on the footing of wilful default. By consent the 1st, 2nd and 3rd plaintiffs succeed in their claim to have the deed of release set aside. In consequence all the plaintiffs succeed in their claim against the 1st defendant for administration of the deceased's estate. The claim of all the plaintiffs against the 2nd defendant fails, and he is entitled to judgment.

Question of costs reserved for further argument.

Order accordingly.

[ORIGINAL CIVIL JURISDICTION]
TERRELL, J.A.
February 19, 1940.

IN RE A MEMORANDUM OF CHARGE DATED 17th OF DECEMBER 1935.

A. R. P. L. RAMANATHAN CHETTIAR

vs.

CHEANG SUNNY.

[SINGAPORE ORIGINATING SUMMONS No. 49 of 1937]
[AMENDED SUMMONS IN CHAMBERS No. 205 of 1939]

Practice—Sale wholly out of Court—Application —order—absence of prefatory declaration—irregularity —ex parte order—Rules of the Supreme Court, 1934, 0.48 r.2: 0.53 r.17(1); 0.63 r.1.

Before making an order for sale out of Court under Order 48 Rule 2 of the Rules of the Supreme Court, 1934, it is the duty of the Court or a Judge to require evidence that all persons interested in the estate to be sold are before the Court and the order should be prefaced with a declaration that the Judge is satisfied that all such persons are before the Court and with a statement of the evidence upon which the declaration is founded. Any order made without regard to the provisions of this rule may be set aside. Discretion of Court in setting aside an **exparte** order.

Cases referred to:—

(1) *Farden v. Richter,* 23 Q.B.D. 124.

(2) *Pitt v. White,* 57 L.T. 650.

SUMMONS IN CHAMBERS by the defendant to set aside an *exparte* Order of the Judge dated the 6th May, 1937.

[The above decision does not lay down any new law but is reported for the sole purpose of emphasising the necessity of strictly following the procedure laid down in Order 48 Rule 2 in all cases where an order for sale out of Court is sought. The provisions of this rule, it seems, have on more than one occasions been overlooked by practitioners of the Colony.

It must also be noted that even if there is an objection to the order which appears on the face of it a purchaser is not entitled to object to the title on that account as the irregularity even if appearing on the face of the order is cured by the Conveyancing and Law of Property Ordinance, Section 75 (the equivalent of the English Section 70). See **in re Hall Dare's Contract,** 21 Ch. Div. 41 (C.A.) and **Mostyn v. Mostyn,** (1893) 3 Ch. 376.—Ed. M.L.J.]

The facts and arguments are sufficiently related in the judgment below.

Aditan for the defendant (applicant).

Green for the plaintiff (respondent).

Cur. Adv. Vult.

Terrell, J. A.—The defendant applicant had an interest in the estate of his father Cheang Jim Hoe, and of his grandfather Cheang Hong Lim. On the 24th April, 1931, the applicant was adjudicated a bankrupt, and his property vested in the Official Assignee. On the 27th July, 1934, he obtained his discharge subject to a judgment for $600 which has not yet been fully satisfied. It is clear that, even after his discharge, any property of the bankrupt which belonged to him prior to his bankruptcy was still vested in the Official Assignee, and that the bankrupt was only entitled to the surplus, if any.

On the 17th December, 1935, the applicant executed a charge upon his share in his father's and grandfather's estates in favour of the plaintiff to secure moneys due, or to be due, on current account up to a total amount of $1,500 with interest at 24 per cent. per annum. At the same time the applicant executed a promissory note for $1,400 repayable by 20 instalments. It is not disputed that no payment was made in respect of the promissory note, or that written demand for payment was made on the 5th March, 1937, and that such demand was not complied with. Thereupon the plaintiff was in a position to enforce his security by sale under the provisions of the Conveyancing and Law of Property Ordinance.

Before this notice of demand was given there had been correspondence between the plaintiff's solicitors and Messrs. Zehnder Bros. who were solicitors for the executrix of Cheang Jim Hoe's estate, with reference to a proposed garnishment of the applicant's interest, and on the 4th March, 1937, another client of Messrs. Zehnder Bros., one Low Phua Min, offered to buy the properties comprised in the charge for $1,000 together with interest at 15 per cent. from 17th December, 1935. Messrs. Zehnder Bros. were not willing to accept an assignment in pursuance of the plaintiff's power of sale, and first of all suggested that the plaintiff should foreclose, as there might be difficulties in preparing particulars and conditions of sale in the case of a sale by auction. Later Messrs. Zehnder Bros. suggested an application to Court to sell by private treaty. This proposal was accepted by the plaintiff's solicitors on the 5th March, 1937, and they proceeded to prepare their application to Court and the affidavit in support. These documents were